

United States
³
Circuit Court of Appeals
For the Ninth Circuit.

D. PINCOLINI and J. PINCOLINI,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Nevada.

FILED

APR 11 1923

F. D. MONKTON,
CLERK

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Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. McCARRAN & MASHBURN, Reno, Nevada,

For the Plaintiff in Error.

Honorable GEORGE SPRINGMEYER, United States Attorney for the District of Nevada, Reno, Nevada, and Honorable C. A. CANTWELL, Assistant United States Attorney for the District of Nevada, Reno, Nevada,

For the Defendant in Error. [1*]

In the District Court of the United States, in and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

**Indictment for Violation of Sec. 37 F. C. C. and
The National Prohibition Act.**

United States of America,

District of Nevada,—ss.

Of the May Term of the District Court of the United States of America, in and for the District of Nevada, in the year of our Lord nineteen hundred and twenty-two,—

*Page-number appearing at foot of page of original certified Transcript of Record.

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the District of Nevada, in the name and by the authority of the United States of America, upon their oaths do find and present:

That A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, hereinafter called the defendants, heretofore and at some time prior to August 2, 1922, the exact date being unknown, before the finding of this indictment, in the City of Reno, Washoe County, State and District of Nevada, in violation of Section 37 of the Criminal Code, did wilfully, unlawfully, knowingly and corruptly conspire, combine, confederate and agree to commit offenses against the United States of America, to wit: to possess and sell at those certain premises known and described as the "Mizpah Hotel," situate at number 214 Lake Street, Reno, Washoe County, State and District of Nevada, intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes, in violation of the National [2] *Prohibition*, and that the aforesaid conspiracy continued and was in process of execution by said defendants during and including August 2d, 1922, and at the time of the commission of each of the overt acts in this count set forth.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

That the said A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, hereinafter called the defendants, heretofore, to wit: On August 2d, 1922,

before the finding of this indictment, in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, at those certain premises known and described as the "Mizpah Hotel," situate at number 214 Lake Street, Reno, Washoe County, State and District of Nevada, did wilfully, unlawfully and knowingly possess and sell intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

That the said A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, hereinafter called the defendants, heretofore, to wit: On August 2d, 1922, before the finding of this indictment, in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, at those certain premises known and described as the "Mizpah Hotel," situate at number 214 Lake Street, Reno, Washoe County, State and District of Nevada, did have rooms under lock and key into which only persons known by said defendants to be addicted to the use of intoxicating liquor were admitted.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

That the said A. Pincolini, D. Pincolini, J. Pincolini and [3] Susie Pincolini, hereinafter called the defendants, heretofore, to wit: On August 2d, 1922, before the finding of this indictment, and in

pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, at those certain premises known and described as the "Mizpah Hotel," situate at number 214 Lake Street, Reno, Washoe County, State and District of Nevada, did upon the approach of Federal Prohibition Agents and in their presence, wilfully and knowingly destroy intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes;

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

SECOND COUNT.

That the said A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, hereafter called the defendants, heretofore, to wit: On or about the 2d day of August, 1922, and before the finding of this indictment, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as the "National Prohibition Act," did then and there wilfully, unlawfully and knowingly possess intoxicating liquor, to wit: liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present: [4]

THIRD COUNT.

That the said A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, hereafter called the defendants, heretofore, to wit: On or about the 2d day of August, 1922, and before the finding of this indictment, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court, in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as the "National Prohibition Act," did then and there wilfully and unlawfully sell intoxicating liquor, to wit: liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

FOURTH COUNT.

That the said A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, hereinafter called the defendants, heretofore, to wit: On or about the 2d day of August, 1922, and before the finding of this indictment, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court, in violation of Section 21, Title II, of

the Act of Congress dated October 28, 1919, known as the "National Prohibition Act," did then and there wilfully and unlawfully maintain a common nuisance in that the said A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, did wilfully and unlawfully keep for sale in that certain building situate at number 214 Lake Street, Reno, County of Washoe, State and District of Nevada, and described as the "Mizpah Hotel," intoxicating liquor, to wit: liquor containing one-half or one per cent, or more, of alcohol by volume, fit for [5] use for beverage purposes.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

GEORGE SPRINGMEYER,

United States Attorney.

Names of witnesses examined before the Grand Jury on finding the foregoing indictment: P. Nash.

[Endorsed]: No. 5663. United States District Court, District of Nevada. The United States of America vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. Indictment for Violation Sect. 37 F. C. C. A True Bill. W. P. Harrington, Foreman. Filed in open Court this 16th day of August, A. D. 1922. E. O. Patterson, Clerk. Bail, \$——. Jany. 18—Each—5 Months and Each 500.00 Fine and Costs. [6]

Bench Warrant.

UNITED STATES OF AMERICA,
District of Nevada.

To the Marshal of the United States for the District of Nevada, and to His Deputies and Any or Either of Them,—GREETING:

WHEREAS, at a District Court of the United States of America, begun and held at Carson City, Nevada, within and for the District aforesaid, on the 1st day of May, 1922, the Grand Jurors in and for said District brought into said Court a true bill of indictment against A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, charging them with the crime of having on or about August 2, 1922, at Reno, in the county of Washoe, District of Nevada, violated Section 37 F. C. C. and the National Prohibition Act, as by said indictment now remaining on file and of record in said court more fully appears, to which indictment the said defendants hath not yet appeared or pleaded.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, in the name of the President of the United States, to apprehend the said defendants and bring them before said Court in Carson City, Nevada, to answer unto said indictment Aug. 26, 1922, or, if they require it that you take them before the Judge of said Court, or any United States Commissioner in said District, that they each may give bail in the sum of \$1500.00 each and all of them to answer said indictment.

WITNESS, the Honorable E. S. FARRINGTON, Judge of said District Court, and the seal thereof hereunto affixed, at Carson City, Nevada, this 16th day of August, 1922.

[Seal]

Attest: E. O. PATTERSON,
Clerk.

By O. E. Benham,
Deputy.

GEORGE SPRINGMEYER,
U. S. Attorney. [7]

[Endorsed]: No. 5663. United States District Court, District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. Bench Warrant. Filed on return this 7th day of Sept., 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy Clerk.

Criminal Docket No. 3535.

MARSHAL'S RETURN.

Executed the within bench warrant on the within named defendants at Carson City, Nevada, on the 26th day of August, 1922, and I now have them before the United States District Court at Carson City, Nevada, this 26th day of August, 1922.

J. H. FULMER,
U. S. Marshal.

By J. P. Fodrin,
Deputy Marshal.

In the District Court of the United States for the
District of Nevada.

No. 5663.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Verdict (A. Pincolini).

We, the jury in the above-entitled case, find the defendant, A. Pincolini, not guilty as charged in the first count of the indictment; not guilty as charged in the second count; not guilty as charged in the third count; and not guilty as charged in the fourth count.

Dated this 29th day of November, 1922.

C. F. STOCK,
Foreman.

[Endorsed]: No. 5663. U. S. District Court, District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. Verdict. Filed this 29 day of November, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

In the District Court of the United States for the
District of Nevada.

No. 5663.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Verdict (Susie Pincolini).

We, the jury in the above-entitled case, find the defendant, Susie Pincolini, not guilty as charged in the first count of the indictment; not guilty as charged in the second count; not guilty as charged in the third count; and not guilty as charged in the fourth count.

Dated this 29th day of November, 1922.

C. F. STOCK,
Foreman.

[Endorsed]: No. 5663. U. S. District Court, District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. Verdict. Filed this 29 day of November, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy.
[8]

In the District Court of the United States for the
District of Nevada.

No. 5663.

THE UNITED STATES

vs,

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Verdict (J. Pincolini).

We, the jury in the above-entitled case, find the defendant, J. Pincolini, not guilty as charged in the first count of the indictment; guilty as charged in the second count; guilty as charged in the third count; and guilty as charged in the fourth count.

Dated this 29th day of November, 1922.

C. F. STOCK,
Foreman.

[Endorsed]: No. 5663. U. S. District Court, District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. Verdict. Filed this 29th day of November, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

In the District Court of the United States for the
District of Nevada.

No. 5663.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Verdict (D. Pincolini).

We, the jury in the above-entitled case, find the defendant, J. Pincolini, not guilty as charged in the first count of the indictment; guilty as charged in the second count; guilty as charged in the third count; and guilty as charged in the fourth count.

Dated this 29th day of November, 1922.

C. F. STOCK,

Foreman.

[Endorsed]: No. 5663. U. S. District Court, District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. Verdict. Filed this 29th day of November, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy. [9]

No. 5663.

Indictment for Violation Section 37, F. C. C. and
National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Minutes of Court—August 16, 1922—Order for Issuance of Capias.

The Grand Jury impaneled in and by this Court having this day presented a true bill of indictment in this case, IT IS ORDERED that a capias issue herein returnable Saturday, August 26, 1922, at ten o'clock A. M., and that, when apprehended, the defendants may be admitted to bail upon giving a good and sufficient bond in the sum of \$1500.00 each.

No. 5663.

Indictment for Violation Section 37, F. C. C. and
National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Minutes of Court—August 26, 1922—Arraignment.

These defendants appeared this day with their attorney, Mr. T. J. D. Salter, and were thereupon duly arraigned upon the said indictment as required by law. They each declared their true name to be as stated in the indictment and each entered a plea of not guilty as charged in the indictment. Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that the bond of these defendants be, and the same is hereby, fixed at Twenty-five Hundred

(\$2500.00) Dollars each to be filed Monday, August 28, 1922. [10]

No. 5663.

Indictment for Violation Section 37, F. C. C., and
National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

**Minutes of Court—October 2, 1922—Order Setting
Trial Date.**

Upon motion of Mr. George Springmeyer, United States Attorney, IT IS ORDERED that the trial of this case be, and the same is hereby, set down for October 4, 1922, at ten o'clock A. M.

No. 5663.

Indictment for Violation National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

**Minutes of Court—November 20, 1922—Order Re-
setting Trial Date.**

Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that

this case be, and the same is hereby, set down for trial on November 27, 1922, to follow case No. 5619.

No. 5663.

Indictment for Violation Section 37, Criminal Code
and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Minutes of Court—November 27, 1922—Trial.

This cause coming on regularly for trial this day, Mr. C. A. Cantwell, *Assistant United States*, appeared for and on behalf of the plaintiff: Messrs. T. J. D. Salter and James Frame for the defendants,—the defendants being personally present. Stipulated by counsel that if there are not sufficient jurors upon the regular [11] panel that Talesman may be brought in from Ormsby County. The following named jurors were accepted by the parties and duly sworn to try the issue, viz.: L. Radcliffe, Fred Allerman, Herbert B. Maxon, A. B. Dickinson, Howard Sullivan, R. H. Roy, Charles A. Brulin, Charles Miller, Thomas Rowe, C. F. Stock, Jerald P. Miller and F. S. Cliff. The indictment was read to the jury by the clerk and the pleas of the defendants stated. Upon motion of Mr. Frame the following named witnesses were marshaled and duly sworn

and admonished by the Court, viz.: P. Nash, Thomas Scott, R. L. Hogue, A. Carter and P. E. DuBois for plaintiff; and W. M. McCafetry, the only witness, for defendants. P. Nash was the first witness called by plaintiff and during his testimony plaintiff had marked one pint bottle two-thirds full of liquor, Plffs. Ex. No. 1 for Identification; one small individual bottle nearly full of liquor marked Plffs. Ex. No. 2 for Identification; one pint bottle two-thirds full liquor marked Plffs. Ex. No. 3 for Identification; one pint bottle one-fourth full of liquor marked Plffs. Ex. No. 4 for Identification; one, one-gallon demijohn wrapped in newspaper marked Plffs. Ex. No. 5 for Identification; one, one-gallon demijohn wrapped in newspaper marked Plffs. Ex. No. 6 for Identification; one, one-gallon demijohn wrapped in newspaper marked Plffs. Ex. No. 7 for Identification; one sealed milk bottle with dregs of liquor marked Plffs. Ex. No. 8 for Identification; five small liquor glasses marked Plffs. Ex. No. 9 for Identification; one medium sized funnel marked Plffs. Ex. No. 10 for Identification; one large funnel marked Plffs. Ex. No. 11 for Identification; one broken pair of ladies' scissors marked Plffs. Ex. No. 12 for Identification; one gunny-sack one-third full of broken glass marked Plffs. Ex. No. 13 for Identification; three silver dollars dated 1882, 1890 and 1900 respectively marked Plffs. Ex. No. 14 for Identification; one "Clinton" lock-key marked Plffs. Ex. No. 15 for Identification. The witness also testified from a blackboard sketch made by himself. Thomas

Scott and P. E. DuBois were each called in turn and testified for plaintiff. Mr. S. C. Dinsmore, State Chemist, was duly sworn and testified for plaintiff, and during his testimony plaintiff had marked one half-pint flask partially filled with liquor Plffs. Ex. No. 16 for Identification; and another half-pint flask partially filled with liquor Plffs. Ex. No. 17 for Identification. And during the testimony of the last two witnesses Plffs. Ex. Nos. 8 for Identification; 5 for Identification; 6 for Identification; 7 for Identification; 13 for Identification and 10 for Identification, all offered in evidence, admitted and ordered marked Plffs. Ex. Nos. 8, 5, 6, 7, 13 and 10. At 4:45 o'clock P. M. the jury was admonished by the Court not to talk among themselves about the case nor to allow others to talk to them or in their presence and to refrain from making up their minds as to what their verdict would be until the case was finally submitted to them and they were excused until ten o'clock to-morrow morning. [12]

No. 5663.

Indictment for Violation Section 37, Criminal Code, and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Minutes of Court—November 28, 1922—Trial (Continued).

The same counsel, the defendants and the jury being present the trial of this case was resumed this day. Witnesses A. Carter, R. L. Hague and Thomas Scott were each called in turn by plaintiff and during their testimony Plffs. Ex. Nos. 15, 1, 2, 3, 4, 14, 12, 16, 17, and 9 all for Identification, admitted and ordered marked Plffs. Ex. Nos. 15, 1, 2, 3, 4, 14, 12, 16, 17 and 9 respectively. Thereupon plaintiff rested. Upon motion of Mr. Frame the jury was excused to allow him to make a motion without their hearing. Mr. Frame moved the Court for a directed verdict of not guilty as to the defendants A. Pincolini, D. Pincolini and J. Pincolini; and he also moved the Court for a directed verdict as to Susie Pincolini. Both motions argued by counsel for the respective parties and IT IS ORDERED that the said motions be, and the same are hereby, denied. Defendants waived their opening statement. The following witnesses were produced at this time for defendants, each duly sworn and placed under the rule after being admonished by the Court, viz.: A. B. McAvoy, L. M. Leonard, John Capuro, James Boyd, A. Blundell, John W. O'Bannion, Averita Pincolini and Louigi Toccini and all were called and testified in behalf of the defendants except the witness Blundell; and in addition to these witnesses the defendant Dante Pincolini was duly sworn and testified. Mr. Charles Bondietti was

also sworn as interpreter for the witness Louigi Toccini. At 4:30 P. M. the Court again admonished the jury as before and excused them until ten o'clock to-morrow morning.

No. 5663.

Indictment for Violation Section 37, Criminal Code, and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Minutes of Court—November 29, 1922—Trial (Continued).

The same counsel, the defendants and the jury being present the trial of this case was resumed this day. A. Pincolini, Susie Pincolini and Joe Pincolini, the defendants, were each duly sworn and testified in their own behalf; and James Boyd was recalled and further testified upon direct for defendants. During this testimony defendant offered in evidence one hollow sink leg four or five inches square, admitted and ordered marked Defts. Ex. No. A. Thereupon defendants rest. J. P. Donnelly and Jonathan Payne were each duly sworn and testified in rebuttal for plaintiff; and witnesses P. Nash, R. L. Hague, A. Carter, P. E. DuBois and Thomas Scott. By stipulation plaintiff was allowed to recall defendants' witness Joe

[13] Pincolini upon further cross-examination. No further testimony being adduced and after argument by counsel for the respective parties the case was submitted. Thereupon, and after hearing the instructions given by the Court, the jury retired in charge of the Marshal to deliberate on the case, and at 8:30 o'clock P. M. came into court with the following verdict, viz.: "In the District Court of the United States for the District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. No. 5663. We, the jury in the above-entitled case, find the defendant A. Pincolini, not guilty as charged in the first count of the Indictment; not guilty as charged in the second count; not guilty as charged in the third count; and not guilty as charged in the fourth count. Dated this 29th day of November, 1922. C. F. Stock, Foreman." "In the District Court of the United States for the District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. No. 5663. We, the jury in the above-entitled case find the defendant D. Pincolini, not guilty as charged in the first count of the Indictment; guilty as charged in the second count; guilty as charged in the third count; and guilty as charged in the fourth count. Dated this 29th day of November, 1922. C. F. Stock, Foreman." "In the District Court of the United States for the District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. No. 5663. We, the jury in the above-entitled case, find the defendant,

J. Pincolini, not guilty as charged in the first count of the Indictment; guilty as charged in the second count; guilty as charged in the third count; and guilty as charged in the fourth count. Dated this 29th day of November, 1922, C. F. Stock, Foreman." "In the District Court of the United States for the District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. No. 5663. We, the jury in the above-entitled case, find the defendant Susie Pincolini, not guilty as charged in the first count of the indictment; not guilty as charged in the second count; not guilty as charged in the third count; and not guilty as charged in the fourth count. Dated this 29th day of November, 1922. C. F. Stock, Foreman,"—and so they all say. IT IS ORDERED that the defendants D. Pincolini and J. Pincolini be and appear in this court on December 9th, 1922, at ten o'clock for sentence. IT IS FURTHER ORDERED that the bonds of the defendants A. Pincolini and Susie Pincolini be and they are hereby discharged and the bondsmen relieved from further liability thereon. [14]

No. 5663.

Indictment for Violation National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Minutes of Court—December 4, 1922—Order Continuing Passing of Sentence to December 23, 1922.

Upon motion of Mr. P. A. McCarran that he has just been retained as counsel in this case and that the former counsel are about to retire, IT IS ORDERED that the defendants have to and until December 23, 1922, within which to prepare their papers on appeal and that the matter of passing sentence be continued to and until that date.

No. 5663.

Indictment for Violation of Section 37, Criminal Code and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Minutes of Court—December 23, 1922—Order Continuing Passing of Sentence to January 10, 1923.

Upon motion of Mr. P. A. McCarran, attorney for the defendants herein, IT IS ORDERED that the passing of sentence in this case be, and the same is hereby, continued to and until January 10th, 1923, at ten o'clock A. M. [15]

No. 5663.

Indictment for Violation of National Prohibition
Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

**Minutes of Court—January 9, 1923—Order Con-
tinuing Passing of Sentence to January 17,
1923.**

Upon motion of Mr. P. A. McCarran, attorney
for the defendants herein, and good cause being
shown, IT IS ORDERED that the time for pass-
ing sentence in this case be, and the same is hereby,
continued to and until January 17, 1923, at ten
o'clock A. M.

No. 5663.

Indictment for Violation of National Prohibition
Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

**Minutes of Court—January 17, 1923—Order Con-
tinuing Passing of Sentence to January 18,
1923.**

Upon motion of Mr. G. Mashburn, attorney for

these defendants, IT IS ORDERED that the passing of sentence in this case be, and the same is hereby, continued to and until to-morrow morning at ten o'clock. [16]

No. 5663.

Indictment for Violation of National Prohibition Act, and Section 37, Criminal Code.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Minutes of Court—January 18, 1923—Judgment Order.

The defendants J. and D. Pincolini appeared this day with their attorney, Mr. P. A. McCarran, who presented a motion for a new trial and a motion in arrest of judgment. Both motions submitted to and by the Court ORDERED overruled and denied. This being the time heretofore fixed for sentence in this case the Court pronounced judgment as follows, addressing the defendants J. Pincolini and D. Pincolini: In consideration of the law and the premises, IT IS HEREBY ORDERED AND ADJUDGED that you and each of you be imprisoned in the county jail of Washoe County, Nevada, for the period of five (5) months from and after this date, that you pay to the United States a fine in the sum of Five Hundred (\$500.00) Dollars each and that you stand committed in said

county jail until the said fines are paid together with all costs herein incurred. Thereupon Mr. McCarran filed his assignments of error; petition for writ of error; bond on writ of error in the sum of Four Thousand (\$4,000.00) Dollars each; cost bond in the sum of Five Hundred (\$500.00) Dollars; and IT IS ORDERED that the said Four Thousand Dollar bonds be, and they are considered and may act as a supersedeas bond in each case. IT IS FURTHER ORDERED that the writ of error be, and the same is hereby, allowed. [17]

No. 5663.

Indictment for Violation Section 37, Criminal Code
and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Minutes of Court—February 19, 1923—Order Continuing Time to File Record on Appeal.

Upon motion of Mr. P. A. McCarran, attorney for defendants, IT IS ORDERED that the defendants be, and they are hereby allowed to and until March 19th, 1923, within which to prepare and file record on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5663.

Indictment for Violation Section 37, Criminal Code
and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

**Minutes of Court—February 23, 1923—Order Con-
tinuing Settlement of Bill of Exception.**

Upon motion of Mr. C. A. Cantwell, Assistant
United States Attorney, IT IS ORDERED that
the hearing and settlement of bill of exception in
this case be, and the same is hereby continued to
March 3, 1923, at ten o'clock A. M. [18]

No. 5663.

Indictment for Violation Section 37, Criminal Code
and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

**Minutes of Court—March 3, 1923—Withdrawal of
Plaintiff's Objections to Bill of Exception,
Which is to be Settled by Stipulation.**

Upon stipulation of counsel, IT IS ORDERED
that plaintiff be, and it is hereby allowed to with-

draw plaintiff's objections to the proposed bill of exception upon defendant incorporating all amendments and objections as therein contained, in a proposed bill of exception, to be settled by counsel on stipulation.

No. 5663.

Indictment for Violation Section 37, Criminal Code
and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

**Minutes of Court—March 10, 1923—Order Fixing
Time for Proposed Bill of Exception to be
Presented for Approval.**

Upon motion of Mr. George Springmeyer, United States Attorney, IT IS ORDERED that the engrossed bill of exception be presented to this Court for settlement and approval on March 19, 1923.

[19]

No. 5663.

Indictment for Violation Section 37, Criminal Code
and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Minutes of Court—March 19, 1923—Order Approving Bill of Exception and Continuing Time to File Record.

Upon motion of Mr. G. Mashburn, attorney for defendants, IT IS ORDERED that the bill of exception here presented be, and the same is hereby settled, approved and allowed. IT IS FURTHER ORDERED that defendants be, and they are hereby allowed thirty days from and after this day within which to prepare and file record on appeal in the United States Circuit Court of Appeals for the Ninth Circuit. [20]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

Motion in Arrest of Judgment.

COME NOW the only two of the above-named defendants against whom verdicts were rendered in the above-entitled cause, to wit, D. Pincolini and J. Pincolini, and each of them, after verdict against each of them and before sentence, in their own proper person, and each in his own proper per-

son, and by McCarran & Mashburn, their attorneys, and move the above-entitled court to arrest judgment herein and not to pronounce the same, for the following reasons:

I.

That the fourth count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense in violation of Section 21, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.

II.

That the second count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense, and particularly the offense charged therein, in violation of Section 3, Title 2, of the Act [21] of Congress dated October 28, 1919, known as the National Prohibition Act.

III.

That the third count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense, and particularly the offense charged therein, in violation of Section 3, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.

IV.

That the following irregularity, omission or defect appears from the record, or should appear from the record, of the proceedings had at the

trial of said cause and during said trial, outside of the evidence:

That after the jury in said action had been duly impaneled and sworn to try said cause, to wit, during the afternoon of the second day of said trial and at the close of the testimony of witness Thomas Scott and at the time counsel for the Government announced that the Government rested, the Court excused the jury and allowed it to leave the courtroom without giving the jury the usual admonition for said jurors not to discuss the case among themselves or with any other person, and without admonishing it as to any other matters contained in the usual admonition to a jury when excusing it and allowing it to leave the courtroom or to separate.

V.

That the evidence adduced and presented to the Court and jury at the trial of said cause is and was insufficient to justify said verdict of guilty against said D. Pincolini as charged in either the second count of said indictment or in the [22] third count of said indictment or in the fourth count of said indictment.

VI.

That the evidence adduced and presented to the Court and jury at the trial of said cause is and was insufficient to justify said verdict of guilty against said J. Pincolini as charged in either the second count of said indictment or in the third count of

said indictment or in the fourth count of said indictment.

McCARRAN & MASHBURN,
Attorneys for Defendants, D. Pincolini and J. Pincolini.

Service of the foregoing motion in arrest of judgment by copy admitted this — day of January, A. D. 1923.

Attorney for Plaintiff.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Motion in Arrest of Judgment. Filed Jany. 18, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada. Attorneys for Defendants, D. Pincolini and J. Pincolini. [23]

In the District Court of the United States, in and for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,
Defendants.

Motion for New Trial.

COMES NOW D. Pincolini and J. Pincolini, two of the defendants in the above-entitled cause, by McCarran & Mashburn, their attorneys, and move the above-entitled court to set aside the verdicts rendered against them herein, and the verdict rendered against each of them, and to grant them, and each of them, to wit, the said D. Pincolini and J. Pincolini, a new trial, and for their, and each of their, reasons therefor, and for grounds therefor, show to the Court the following:

I.

That the verdict so rendered herein against said D. Pincolini is contrary to the law of the case.

II.

That the verdict rendered herein against said J. Pincolini is contrary to the law of the case.

III.

That the verdict so rendered against said D. Pincolini is not supported by the evidence in and to the degree required by law. [24]

IV.

That the verdict so rendered against said J. Pincolini is not supported by the evidence in and to the degree required by law.

V.

That the evidence adduced and presented to the Court and jury at the trial of said cause is, and was, insufficient to justify said verdict against said D. Pincolini.

VI.

That the evidence adduced and presented to the Court and jury at the trial of said cause is, and was, insufficient to justify said verdict against said J. Pincolini.

VII.

Errors in law occurring at the trial and excepted to by the defendants, D. Pincolini and J. Pincolini, and each of them, which prejudiced each of said defendants herein named, and prevented them from having a fair and impartial trial, a memorandum of which will be served within the time required by law.

VIII.

That the fourth count set forth in the indictment herein fails to allege, and does not set forth, facts sufficient to constitute a public offense, and particularly the offense charged therein.

IX.

Irregularities in the proceedings of said Court and jury, and each of them, by which said D. Pincolini and said J. Pincolini were, and each of them was, prevented from having a fair trial, as shown by the affidavit attached hereto.

X.

That the Court improperly instructed the jury to the [25] prejudice of said defendants, D. Pincolini and J. Pincolini, and each of them, in this, to wit:

(a) That the Court instructed the jury in effect that there was sufficient evidence on the third count of the indictment, to wit, the charge that said

defendants made sales of intoxicating liquor in violation of the law, as charged in the indictment, and thereby exceeded the province of the court and its jurisdiction and authority and invaded the province of the jury, in using the following language:

“There has been an abundance of evidence on the third count in the indictment, of making sales.”

(b) In giving this instruction or using this language relating to testimony given by witnesses Scott and Hogue of sales made to them:

“If their testimony is true, it shows that defendants were engaged in that place in selling liquor, at least on those days,”

in that it is too broad a statement of the law in its scope, and applies, as given, to all the defendants and is not limited, as to its effect and what it shows, to the defendants who these witnesses testified made these particular sales and those shown to have been acting in concert with them or in aid of them, and also in that it invades the province of the jury in stating the effect this testimony must be given.

(c) In giving this instruction relating to the proof of possession of intoxicating liquor and the necessity of proving actual possession and knowledge of possession by each of the defendants:

“If each knew that the intoxicating liquor was there and it was kept there with his knowl-

edge, and they were engaged in the business, the possession of one would be the possession of the other," [26]

in that this instruction, as given, is not limited to a situation or condition where defendants has been proven to have been engaged in the business together and jointly, but the instruction should have contained the element of joint business or business in which the defendants concerned in the transaction were jointly engaged.

(d) In not including these words, "as to what the law is," or words of similar import, after the word, "instructions," in the following instruction:

"You are bound to submit these matters of fact to your own conscience and to your own judgment; under the instructions, and a true verdict render,"

in that and for the reason that the jury might have deemed that the instruction referred to in this language applied and referred to instructions or comments of the Court as to matters of fact and to references made by the Court to the testimony in commenting on it and on what it showed and as to its abundance or sufficiency, as in this paragraph of this motion shown, such as the comment of the Court that if certain testimony be true "it shows that defendants were engaged in that place in selling liquor," and such as the comment of the Court when it stated, "There has been an abundance of evidence on the third count in the indictment, of making sales."

(e) In summing up the testimony and applying it to the various charges in the indictment, and in commenting on it and its effect, and more particularly in this comment and question put to the jury for its consideration:

“Isn’t it rather a significant circumstance that this man only went up there on the 29th of July, it was the first time he had ever had that room, that he only stayed there until the raid was made, then disappears from the house and is not there again as a tenant until this case comes on for trial; three days he has been there, and there is one day coming.”

[27]

(f) In calling the attention of the jury to the interest of the defendants in the case and in suggesting as an inducement for them to testify as they did in the case an attempt to shield themselves from the consequences of a violation of the law in the use of the following language, in instructing the jury as to what elements they should take into consideration in weighing the testimony in this case:

“Whether it is an attempt on his part to shield himself from the consequences of a violation of the law,”

without at the same time calling the attention of the jury to the interest that the prohibition officers might have had in the case, to wit, their anxiety to justify their conduct in making the raid and to procure a conviction upon the indictment which they had secured.

XI.

That the second count set forth in the indictment herein fails to allege, and does not set forth, facts sufficient to constitute a public offense, and particularly the offense charged therein.

McCARRAN & MASHBURN,
Attorneys for Defendants, D. Pincolini and J.
Pincolini. [28]

In the District Court of the United States, in and
for the District of Nevada.

No. 5663.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

Affidavit on Motion for New Trial.

State of Nevada,
County of Washoe,—ss.

J. Pincolini, being first duly sworn, on his oath deposes and says: That he is one of the defendants in the above-entitled cause, and is informed and knows of the proceeding had at the trial of said action; that at the trial of said cause and in the afternoon of the second day thereof at the close of the testimony of one Thomas Scott, a witness produced and who testified on behalf of the plaintiff in said cause at said trial, and after

the jury in said cause had been duly impaneled and sworn to try said cause, and after the plaintiff herein had introduced and presented all its testimony and evidence in chief at said trial and counsel for plaintiff had announced to the Court that the plaintiff rested, the above-entitled court excused said jury and allowed it to leave the courtroom and the presence of the Court, and, according to the information and belief of affiant, to separate, without giving said jury the usual admonition required by law to the effect, among other things, that the jurors composing said jury must not [29] discuss the case with each other or talk to any other person about it or allow any other person to talk with them about it, and without admonishing it as to other matters contained in the usual admonition to such a jury on such an occasion when excusing it and allowing it to leave the court or to separate; but that said Court merely excused said jury at that time by using only the following language:

“You may be excused for a few minutes, gentlemen. Don’t go very far away, so you will be within reach when the Marshal calls you.”

J. PINCOLINI.

Subscribed and sworn to before me this 18th day of January, A. D. 1923.

[Seal]

GRAY MASHBURN,

Notary Public in and for the County of Washoe,
State of Nevada.

Service of the foregoing motion for new trial and affidavit on motion for a new trial by copy admitted this — day of January, A. D. 1923.

Attorney for Plaintiff.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Motion for New Trial and Affidavit for Same. Filed Jany. 18, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [30]

In the District Court of the United States for the District of Nevada.

October Term, 1922.

Honorable E. S. FARRINGTON, Judge.

Violation of Sec. 37, F. C. C. and the National Prohibition Act.

No. 5663.

UNITED STATES OF AMERICA

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

Judgment.

This being the time heretofore appointed for

passing sentence in this case, the court pronounced judgment as follows, addressing the defendants:

You, D. Pincolini and J. Pincolini, have been indicted by the Grand Jury, impaneled in and by this court for the crime of violating Sec. 37, F. C. C. and the National Prohibition Act by wilfully, unlawfully, knowingly and corruptly conspiring, combining, confederating and agreeing to possess and sell at those certain premises known and described as the "Mizpah Hotel," situate at number 214 Lake Street, Reno, Washoe County, Nevada, intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes; wilfully, unlawfully and knowingly possessing intoxicating liquor; wilfully and unlawfully selling intoxicating liquor; and wilfully and unlawfully keeping for sale in that certain building situate at number 214 Lake Street, Reno, Washoe County, Nevada, and described as the "Mizpah Hotel," intoxicating liquor; said crime having been committed at some time prior to August 2, 1922 to August 2, 1922, and on August 2, 1922, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this court. You were duly arraigned upon that indictment, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found not guilty as charged in the first count of the indictment and guilty as charged in the second, third and fourth counts. The defendants were then

asked if they had any legal cause to show why the judgment of the Court should not now be pronounced against them. To which they replied that they had not. [31]

In consideration of the law and the premises, it is hereby ordered and adjudged that you, and each of you, be imprisoned in the county jail of Washoe County, Nevada, for the period of Five (5) Months from and after this date, and pay to the United States a fine of Five Hundred (\$500.00) Dollars each, and that you stand committed in said county jail until the fines and costs, taxed at \$——, are paid.

Dated and entered January 18, 1923.

Attest: E. O. PATTERSON,

Clerk.

By O. E. Benham,

Deputy. [32]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

**Assignment of Errors of Defendants D. Pincolini
and J. Pincolini.**

D. Pincolini and J. Pincolini, the only defendants

named in the above-entitled cause against whom verdicts of guilty were returned in said cause, and each of them, by their attorneys, McCarran & Mashburn, in connection with their, and each of their, petition for a writ of error, makes the following assignment of errors, which they allege, and each of them alleges, occurred upon the trial of said cause:

I.

That the Court erred in excusing the jury in said cause and allowing it to leave the courtroom after said jury had been duly empanelled and sworn to try said cause, to wit, during the afternoon of the second day of said trial and at the close of the testimony of the witness Thomas Scott and at the time counsel for the Government announced that the Government rested, without giving the jury the usual admonition required by law for said jurors not to discuss the case among themselves or with any other person, and without admonishing it as to any other matters contained in [33] the usual admonition to a jury when excusing it and allowing it to leave the courtroom or to separate, as required by law.

II.

That the Trial Court erred in not permitting and directing the witness testifying for the plaintiff in said cause, P. Nash, to withdraw the key introduced in evidence in the trial of said case as the key to one of the doors between the barroom and the dining-room or ball-room and broken by said witness Nash, and introduced in evidence as Plain-

tiff's Exhibit No. —, and to visit the premises, to wit, Mizpah Hotel, and see if said key fit said door so broken between the soft-drink room, sometimes called the barroom, and the ball-room, sometimes called the dining-room, in said hotel, and to see if there was another door leading from one of said rooms to the other of said rooms, as requested by counsel for defendants.

III.

That said Trial Court also erred in stating that Mr. Saulter, one of defendants' counsel, was not fair in reading the testimony given by Mr. P. E. DuBois at the preliminary examination in said cause to said witness DuBois on the trial of said cause in contradiction of the testimony given by said witness at the trial.

IV.

That said Trial Court also erred in commenting on an effort of defendants' counsel to elicit from plaintiff's witness Scott whether he ever represented himself to be an insurance agent, and more especially in using the following language, "It [the testimony sought] is utterly irrelevant and wasting time," used by the Court, which comment tended to prejudice defendants and their counsel in the minds of the jury. [34]

V.

That said Trial Court also erred in refusing and denying the motion of defendants herein D. Pincolini, J. Pincolini and A. Pincolini, made at the time plaintiff rested, for the Court to instruct the jury that the evidence adduced and presented to the

Court by plaintiff was insufficient at the time said plaintiff rested to justify a conviction of conspiracy.

VI.

That said Trial Court erred in overruling and denying the motion of the defendant Susie Pincolini, made at the time plaintiff rested, for the Court to direct a verdict of not guilty as to her.

VII.

That said Trial Court also erred in commenting before and in the presence of the jury on the failure of defendants and their counsel to place their witnesses under the rule, even after it was shown that said witnesses had not been present in the courtroom and had just arrived in Carson City, Nevada, where said case was then being tried, and more especially in the comment of the Court at that time that said failure to put defendants' witnesses under the rule had given defendants an advantage over the Government.

VIII.

That said Trial Court erred in commenting on the form of the questions asked by defendants' counsel in the examination of defendant D. Pincolini while he was testifying in behalf of defendants, and more especially in the use of the language which necessarily left the impression that counsel was indicating to his said client and witness, D. Pincolini, the answers he wished him to make. [35]

IX.

That the Trial Court also erred in permitting counsel for plaintiff to ask a question of defend-

ants' witness James Boyd tending to belittle and degrade said witness in the minds of the jury, and especially in the use of the following language contained in the question so asked of said witness, "Do you realize right now that if we had the marshal put you under arrest on charge of having possessed liquor on that day there would be nothing for you to do but enter a plea of guilty," and in overruling the objection made to said question by defendants' counsel.

X.

That the Trial Court also erred in permitting the plaintiff's witness J. P. Donnelly to testify in rebuttal, over defendants' objection, as to seeing witness Hogue at his office at the time said witness Hogue was at his office, and other matters relating to his presence there, and also in permitting testimony as to the same in rebuttal from witnesses Payne, Nash, Hogue, Carter, DuBois and Scott.

XI.

That the Trial Court also erred in permitting counsel for plaintiff to suggest and indicate the answer he wished the witness Scott to make to his questions asked of said witness when called in rebuttal as to what he meant by the word "alone" in his testimony given in the preliminary examination in this cause on August 3, 1922, before Anna M. Warren, United States Commissioner, at Reno, at which preliminary examination he testified that when he entered room 16 in said Mizpah Hotel he entered it alone, whereas he testified in the trial of said cause that when he entered said room 16

he entered it with Susie Pincolini, one [36] of the defendants in the above-entitled cause.

XII.

That said Trial Court also erred in permitting counsel for plaintiff to ask the question of defendant herein J. Pincolini when recalled for further cross-examination by counsel for plaintiff as to an alleged conversation between said witness and defendant J. Pincolini and officers Brown and Nash said to have taken place about February 18, 1922, which question was in the following language:

“Now calling your attention to that particular day, whenever it was, that the officers were there and searched, do you recall having had a conversation with officers Brown and Nash that day there in the vicinity of the Mizpah Hotel, in which you said to them, in substance at least, ‘Well, you didn’t find anything, did you?’ to which Mr. Nash replied in substance, ‘No, but we found plenty of indications in the back room and cellars, I guess you will not deny that you had it there, you will surely get caught if you keep it up,’ and to which you replied, ‘Well, I don’t consider that it is committing a crime to sell liquors, and will keep on selling as long as I am out of jail,’ to which Mr. Nash replied to you in effect, ‘All right, if that is the way you feel about it’?”

to which question defendants objected.

XIII.

That the Trial Court erred in denying the motion of said defendants D. Pincolini and J. Pincolini

for a new trial on their behalf upon the following grounds, and in this, to wit:

1. That the verdict so rendered herein against said D. Pincolini is contrary to the law of the case.

2. That the verdict rendered herein against said J. Pincolini is contrary to the law of the case.

3. That the verdict so rendered against said D. Pincolini is not supported by the evidence in and to the degree required by law.

4. That the verdict so rendered against said J. Pincolini [37] is not supported by the evidence in and to the degree required by law.

5. That the evidence adduced and presented to the Court and jury at the trial of said cause is, and was, insufficient to justify said verdict against said D. Pincolini.

6. That the evidence adduced and presented to the Court and jury at the trial of said cause is, and was, insufficient to justify said verdict against said J. Pincolini.

7. Errors in law occurring at the trial and excepted to by the defendants, D. Pincolini and J. Pincolini, and each of them, which prejudiced each of said defendants herein named, and prevented them from having a fair and impartial trial.

8. That the fourth count set forth in the indictment herein fails to allege, and does not set forth, facts sufficient to constitute a public offense, and particularly the offense charged therein.

9. Irregularities in the proceedings of said court and jury, and each of them, by which said D. Pincolini and said J. Pincolini were, and each of them

was, prevented from having a fair trial, as shown by the affidavit on motion for a new trial.

10. That the Court improperly instructed the jury to the prejudice of said defendants, D. Pincolini and J. Pincolini, and each of them, in this to wit:

(a) That the Court instructed the jury in effect that there was sufficient evidence on the third count of the indictment, to wit, the charge that said defendants made sales of intoxicating liquor in violation of law, as charged in the indictment, and thereby exceeded the province of the court and its jurisdiction and authority and invaded the province of the jury, in using the following language:

[38]

“There has been an abundance of evidence on the third count in the indictment, of making sales.”

(b) In giving this instruction or using this language relating to testimony given by witnesses Scott and Hogue of sales made to them:

“If their testimony is true, it shows that defendants were engaged in that place in selling liquor, at least on those days,”

in that it is too broad a statement of the law in its scope, and applies, as given, to all the defendants and is not limited, as to its effect and what it shows, to the defendants who these witnesses testified made these particular sales and those shown to have been acting in concert with them or in aid of them, and also in that it invades the province of

the jury in stating the effect this testimony must be given.

(c) In giving this instruction relating to the proof of possession of intoxicating liquor and the necessity of proving actual possession and knowledge of possession by each of the defendants:

“If each knew that the intoxicating liquor was there, and it was kept there with his knowledge, and they were engaged in the business, the possession of one would be the possession of the other,”

in that this instruction, as given, is not limited to a situation or condition where defendants had been proven to have been engaged in the business together and jointly, but the instruction should have contained the element of joint business or business in which the defendants concerned in the transaction were jointly engaged.

(d) In not including these words, “as to what the law is,” or words of similar import, after the word, “instructions,” in the following instruction:
[39]

“You are bound to submit these matters of fact to your own conscience and to your own judgment, under the instructions, and a true verdict render,”

in that and for the reason that the jury might have deemed that the instruction referred to in this language applied and referred to instructions or comments of the Court as to matters of fact and to references made by the Court to the testimony in commenting on it and on what it showed and as

to its abundance or sufficiency, as in this paragraph of this motion shown, such as the comment of the Court that if certain testimony be true "it shows that defendants were engaged in that place in selling liquor," and such as the comment of the Court when it stated, "There has been an abundance of evidence on the third count in the indictment, of making sales."

(e) In summing up the testimony and applying it to the various charges in the indictment, and in commenting on it and its effect, and more particularly in this comment and question put to the jury for its consideration:

"Isn't it rather a significant circumstance that this man only went up there on the 29th day of July, it was the first time he had ever had that room, that he only stayed there until the raid was made, then disappears from the house and is not there again as a tenant until this case comes on for trial; three days he has been there, and there is one day coming."

(f) In calling the attention of the jury to the interest of the defendants in the case and in suggesting as an inducement for them to testify as they did in the case an attempt to shield themselves from the consequences of a violation of the law in the use of the following language, in instructing the jury as to what elements they should take into consideration in weighing the testimony in this case:

“Whether it is an attempt on his part to shield himself from the consequences of a violation of the law,” [40]

without at the same time calling the attention of the jury to the interest that the prohibition officers might have had in the case, to wit, their anxiety to justify their conduct in making the raid and to procure a conviction upon the indictment which they had secured.

11. That the second count set forth in the indictment herein fails to allege, and does not set forth, facts sufficient to constitute a public offense, and particularly the offense charged therein.

XIV.

That the Trial Court erred in denying the motion of said defendants D. Pincolini and J. Pincolini in arrest of judgment on their, and each of their, behalf, upon the following grounds, and in this, to wit:

1. That the fourth count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense in violation of Section 21, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.

2. That the second count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense, and particularly the offense charged therein, in violation of Section 3, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.

3. That the third count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense, and particularly the offense charged therein, in violation of Section 3, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition [41] Act.

4. That the following irregularity, omission or defect appears from the record, or should appear from the record, of the proceedings had at the trial of said cause and during said trial, outside of the evidence:

That after the jury in said action had been duly impanelled and sworn to try said cause, to wit, during the afternoon of the second day of said trial and at the close of the testimony of witness Thomas Scott and at the time counsel for the Government announced that the Government rested, the Court excused the jury and allowed it to leave the courtroom without giving the jury the usual admonition for said jurors not to discuss the case among themselves or with any other person, and without admonishing it as to any other matters contained in the usual admonition to a jury when excusing it and allowing it to leave the courtroom or to separate.

5. That the evidence adduced and presented to the court and jury at the trial of said cause is and was insufficient to justify said verdict of guilty against said D. Pincolini as charged in either the second count of said indictment or in the third

count of said indictment or in the fourth count of said indictment.

6. That the evidence adduced and presented to the court and jury at the trial of said cause is and was insufficient to justify said verdict of guilty against said J. Pincolini as charged in either the second count of said indictment or in the third count of said indictment or in the fourth count of said indictment.

McCARRAN & MASHBURN,
Attorneys for Defendants D. Pincolini and J. Pincolini. [42]

Service of the foregoing assignment of errors of D. Pincolini and J. Pincolini by copy admitted this
— day of January, 1923.

Attorney for Plaintiff.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini, and Susie Pincolini, Defendants. Assignment of Errors of Defendants D. Pincolini and J. Pincolini. Filed Jany. 18, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [43]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

Petition for Writ of Error.

To the Honorable E. S. FARRINGTON, Judge of
the Above-entitled Court:

COME NOW D. Pincolini and J. Pincolini, the
only two of the above-named defendants against
whom verdicts of guilty were rendered in said
cause, and each of them, by their attorneys, Mc-
Carran & Mashburn, and say, and each of them
says, that on the 18th day of January, 1923, the
above-entitled court entered judgment herein
against each of said defendants, in which judgment
against each of said defendants, petitioners herein,
and the proceedings had prior thereto in this cause,
certain errors were committed, to the prejudice of
said defendants, and each of them, so petitioning
said Court, all of which *are more particularly ap-
pear* from the assignment of errors which is filed,
or is about to be filed, with this petition.

WHEREFORE, said defendants D. Pincolini and
J. Pincolini, petitioners herein, pray, and each of
them prays, that a writ of error may issue in their

behalf, and in behalf of each of them, out of the United States Circuit Court of Appeals for the Ninth [44] Circuit for the correction of the error so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit.

D. PINCOLINI.

J. PINCOLINI.

McCARRAN & MASHBURN,

Attorneys for Defendants D. Pincolini and
J. Pincolini.

Service of the foregoing petition for writ of error by copy admitted this —— day of January, A. D. 1923.

Attorney for Plaintiff.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini, and Susie Pincolini, Defendants. Petition for Writ of Error. Filed Jany. 18, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [45]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

Order Allowing Writ of Error.

On this 18th day of January, A. D. 1923, came the defendants, D. Pincolini and J. Pincolini, by their attorneys McCarran & Mashburn, and filed herein and presented to the Court their petition praying for the allowance of a writ of error and assignment of errors intended to be used by them, praying also that a transcript of the record, testimony, exhibits, stipulations, proceedings and papers, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises.

IN CONSIDERATION WHEREOF, the Court allows a writ of error, upon the defendants, D. Pincolini and J. Pincolini, each giving a bond according to law in the sum of Four Thousand Dollars (\$4,000.00), which shall operate as a supersedeas bond, and that upon the accepting, filing and approval of said bond, the said defendants shall be and they are hereby ordered to be released from custody.

Done in open court this 18th day of January,
A. D. 1923.

E. S. FARRINGTON,
District Judge.

[Endorsed]: No. 5663. In the District Court of
the United States, in and for the District of Nevada.
United States of America, Plaintiff, vs. A. Pin-
colini, D. Pincolini, J. Pincolini and Susie Pin-
colini, Defendants. Order Allowing Writ of Error.
Filed January 18th, 1923. E. O. Patterson, Clerk.
[46]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,
Defendants.

Bail Bond of J. Pincolini on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, J. Pincolini, of the County of Washoe,
State of Nevada, as principal, and Edward Vacchini
and Louis Avanzino, both of Reno, County of
Washoe, State of Nevada, as sureties, are held
and firmly bound unto the United States of
America, in the full and just sum of Four Thousand
Dollars (\$4,000.00), gold coin of the United States
of America, to which payment well and truly to be

made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of January, in the year of our Lord, one thousand nine hundred and twenty-three.

WHEREAS, lately on the 18th day of January, A. D. 1923, at a term of the District Court of the United States for the District of Nevada, in a cause pending in said court between the United States of America, Plaintiff, and A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants, a judgment and sentence was rendered against said defendant J. Pincolini, to wit:

The said J. Pincolini to be fined in the sum of Five Hundred Dollars (\$500.00), and to serve five (5) months in the county jail of Washoe County, State of Nevada, together with [47] costs of suit; and

WHEREAS, the said J. Pincolini obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court in and for the District of Nevada, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the said United States of America to be and appear in said court thirty (30) days from and after the date thereof, which citation has been fully served.

NOW, THE CONDITION of said obligation is such that if said J. Pincolini shall prosecute said

writ of error to effect, and shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument, or when required by law or rule of said court, and from day to day thereafter in said court until such cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made in said Court of Appeals in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States in and for the District of Nevada on such days as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the said United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

J. PINCOLINI.

EDWARD VACCHINA.

LOUIS AVANZINO. [48]

State of Nevada,
County of Ormsby,—ss.

Edward Vacchina and Louis Avanzino, sureties on the annexed foregoing undertaking, being each first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident and freeholder within the County of Washoe, State of Nevada; and that he is worth the sum of Four

Thousand Dollars (\$4,000.00) over and above all his just debts and liabilities, in property not exempt from execution.

EDWARD VACCHINA.

LOUIS AVANZINO.

Subscribed and sworn to before me this 18th day of January, A. D. 1923.

[Seal]

E. O. PATTERSON,

Clerk of the United States District Court, in and for the District of Nevada.

Approved:

CHAS. A. CANTWELL,

Asst. United States Attorney.

E. S. FARRINGTON,

District Judge.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Bail Bond on Writ of Error of J. Pincolini. Filed January 18th, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants. [49]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

Bail Bond of D. Pincolini on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:

That we, D. Pincolini, of the County of Washoe, State of Nevada, as principal, and Edward Vacchini and Louis Avanzino, both of Reno, County of Washoe, State of Nevada, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Four Thousand Dollars (\$4,000.00), gold coin of the United States of America, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of January, in the year of our Lord, one thousand nine hundred and twenty-three.

WHEREAS, lately on the 18th day of January, A. D. 1923, at a term of the District Court of the United States for the District of Nevada, in a cause pending in said court between the United States of America, Plaintiff, and A. Pincolini, D.

Pincolini, J. Pincolini and Susie Pincolini, Defendants, a judgment and sentence was rendered against said defendant, D. Pincolini, to wit:

The said D. Pincolini to be fined in the sum of Five Hundred Dollars (\$500.00), and to serve five (5) months in the [50] county jail of Washoe County, State of Nevada, together with costs of suit; and

WHEREAS, the said D. Pincolini obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court, in and for the District of Nevada, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the said United States of America to be and appear in said court thirty (30) days from and after the date thereof, which citation has been fully served.

NOW, THE CONDITION of said obligation is such that if said D. Pincolini shall prosecute said writ of error to effect, and shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument, or when required by law or rule of said court, and from day to day thereafter in said Court until such cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made in said Court of Appeals in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him

shall be affirmed, and if he shall appear for trial in the District Court of the United States, in and for the District of Nevada on such days as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the said United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

D. PINCOLINI.

EDWARD VACCHINA.

LOUIS AVANZINO. [51]

State of Nevada,
County of Ormsby,—ss.

Edward Vacchini and Louis Avanzino, sureties on the annexed foregoing undertaking, being each first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident and freeholder within the County of Washoe, State of Nevada, and that he is worth the sum of Four Thousand Dollars (\$4,000.00) over and above all his just debts and liabilities, in property not exempt from execution.

EDWARD VACCHINA.

LOUIS AVANZINO.

Subscribed and sworn to before me this 18th day of January, A. D. 1923.

[Seal]

E. O. PATTERSON,
Clerk of the United States District Court, in and for the District of Nevada.

Approved:

CHAS. A. CANTWELL,
Asst. United States Attorney.
E. S. FARRINGTON,
District Judge.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Bail Bond of D. Pincolini on Writ of Error. Filed January 18th, 1923. E. O. Patterson, Clerk. [52]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

Cost Bond on Writ of Error.

WHEREAS, the defendants in the above-entitled action, D. Pincolini and J. Pincolini, have sued out a writ of error through the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the District of Nevada, from a judgment made and entered against them, and each of them, in the above-entitled cause in the United States District Court for the District

of Nevada on the 18th day of January, 1923, or thereabouts; and

WHEREAS, the said defendants, by an order of court heretofore duly made and entered, are required to enter into a bond in the sum of Five Hundred (500.00) Dollars to guarantee the payment of all costs in said cause.

NOW, THEREFORE, in consideration of the premises and of the suing out of said writ of error to the said United States Circuit Court of Appeals for the Ninth District of the United States, we, the undersigned, residents of the County of Washoe, State of Nevada, do hereby jointly and severally undertake and promise on the part of said D. Pincolini and J. Pincolini, and [53] each of them, that they, the said D. Pincolini and J. Pincolini, will pay all damages and costs which may be awarded against them, or either of them, on account of the said writ of error or on the dismissal thereof, not exceeding the sum of Five Hundred (500.00) Dollars, in which amount we acknowledge ourselves jointly and severally bound.

WITNESS our signature this 18th day of January, A. D. 1923.

EDWARD VACCHINA.
LOUIS AVANZINO.

State of Nevada,
County of Washoe,—ss.

Edward Vacchini and Louis Avanzino, each for himself and not one for the other, being first duly sworn, deposes and says: That he is a resident and householder of the County of Washoe, State of Ne-

vada, and is the identical person who signed the above and foregoing bond and undertaking; and that he is worth the sum of Five Hundred (500.00) Dollars over and above all indebtedness and in property subject to execution.

EDWARD VACCHINA.

LOUIS AVANZINO.

Subscribed and sworn to before me this 18th day of January, A. D. 1923.

[Seal]

GRAY MASHBURN,

Notary Public in and for the County of Washoe,
State of Nevada.

The foregoing bond is hereby approved:

CHAS. A. CANTWELL,

Asst. United States Attorney.

E. S. FARRINGTON,

Judge. [54]

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Cost Bond on Writ of Error. Filed Jany. 18, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants. [55]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

Praeipce for Transcript of Record.

To E. O. Patterson, Clerk of the United States Dis-
trict Court, Carson City, Nevada:

Request is hereby made of you that you have
prepared a praeipce of the papers and records in
the above-entitled cause as follows:

The indictment.

Verdict.

Motion for new trial and affidavit in support thereof.

Motion in arrest of judgment.

Sentence and judgment.

Petition for writ of error.

Assignment of errors.

Citation to writ of error.

Writ of error.

Bail and supersedeas bond of D. Pincolini.

Bail and supersedeas bond of J. Pincolini.

Cost bond.

Affidavit of service of writ of error, and [56]
bill of exceptions.

Together with endorsements thereon.

Dated January 20, 1923.

McCARRAN & MASHBURN,
Attorneys for Defendants D. Pincolini and J. Pincolini.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Praeipie for Transcript of Record. Filed Jany. 22, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [57]

In the District Court of the United States in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

Affidavit of Service of Citation to Writ of Error.

State of Nevada,

County of Washoe,—ss.

Gray Mashburn, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the above-named defendants; that on the 20th day of January, 1923, he personally delivered a copy of the citation to writ of error issued and filed

herein on the 18th day of January, 1923, to George Springmeyer, Esq., United States Attorney for the District of Nevada, at his office in Reno, Nevada.

GRAY MASHBURN.

Subscribed and sworn to before me this 23d day of January, 1923.

[Seal]

P. A. McCARRAN,

Notary Public in and for the County of Washoe,
State of Nevada.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Affidavit of Service of Citation to Writ of Error. Filed Jany. 24, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [58]

In the District Court of the United States in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

Affidavit of Service of Writ of Error.

State of Nevada,
County of Washoe,—ss.

Gray Mashburn, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the above-named defendants; that on the 20th day of January, 1923, he personally delivered a copy of the writ of error signed and filed herein on the 18th day of January, 1923, to George Springmeyer, Esq., United States Attorney for the District of Nevada, at his office in Reno, Nevada.

GRAY MASHBURN.

Subscribed and sworn to before me this 23d day of January, 1923.

[Seal]

P. A. McCARRAN,

Notary Public in and for the County of Washoe,
State of Nevada.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Affidavit of Service of Writ of Error. Filed Jany. 24, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [59]

In the District Court of the United States in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

**Order Extending Time to and Including February
28, 1923, to File Bill of Exceptions.**

It appearing to the satisfaction of the Court that the time allowed the above defendants, D. Pincolini and J. Pincolini, within which to present and have their bill of exceptions settled in the above-entitled case is about to expire and will expire on the 18th day of February, 1923, and good cause appearing therefor,—

Now, therefore, upon motion of Messrs. McCarran & Mashburn, attorneys for said defendants,—

IT IS HEREBY ORDERED that said defendants, D. Pincolini and J. Pincolini, have to and including the 28th day of February, 1923, within which to present to the court for settlement and have settled their bill of exceptions in said case, and their time therefor is hereby extended accordingly.

Dated February 19th, 1923.

E. S. FARRINGTON,

Judge.

[Endorsed]: No. 5663. In the District Court of the United States of America, in and for the Dis-

trict of Nevada. United States of American, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Order Extending Time for Bill of Exceptions. Filed Feb. 19, 1923. E. O. Patterson, Clerk. [60]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED, that, during the trial of the above-entitled cause, and while THOMAS SCOTT, a witness called by and who was then testifying in behalf of the plaintiff herein, was being cross-examined, the following questions were asked him by counsel for defendants, to which counsel for plaintiff made the following objection, and on which the Court made the following ruling and comment, and the following proceedings were had, and to which the following exception was taken by defendants:

Testimony of Thomas Scott, for Plaintiff.

“Q. I will ask you whether at that time you were representing yourself to be an insurance agent?

A. Absolutely, no.

Q. Did you ever about that time?

A. Not in Reno.

Q. Well, you did at other places, did you?

A. I did.

The COURT.—Is it necessary to go into that? This examination is taking a long time, I want to get through to-morrow.

Mr. FRAME.—(Q.) Well, do you recall whether you made any representations about the 6th of April as to being an insurance agent? A. No.

Q. And did you ever have any authority to act as insurance agent?

The COURT.—It don't seem to me it is necessary to go into that. If you have any point in it that is legitimate, you can do so; if you propose to put in evidence that he represented himself as an insurance agent, that is one matter; but unless you do I don't think this is material. If it is material you can go into it, but I don't see [61] where it is material.

Mr. FRAME.—It is merely a matter affecting the general credibility of this witness. I would like the record to show that the question is asked for the purpose of affecting the credibility of the witness.

The COURT.—Very well, ask your question.

Mr. FRAME.—Well, I will ask this question for the purpose of permitting the Court to rule. (Q.) Since you have been a prohibition agent, have you ever represented yourself to be an insurance agent?

Mr. CANTWELL.—We object to the question as incompetent, irrelevant and immaterial to any purpose in this case, unless it is accompanied by an offer to prove representations made in connection with this case, or with the purchases this witness has made from these defendants, or some of them.

The COURT.—Objection sustained. If you propose to offer proof to show that your clients were misled in any way in this case, it will be admitted; otherwise it will not.

Mr. FRAME.—It is offered for the purpose of showing the general acts and conduct of this witness since he has been a prohibition agent, for the purpose of affecting his general reputation, and for the purpose of affecting his credibility as a witness in this case, and testing his reliability, and offered as a circumstance to go to the jury.

The COURT.—You may have an exception. It is overruled because it seems to me it is utterly irrelevant, and wasting time.”

BE IT FURTHER REMEMBERED, that at the end of plaintiff’s case in chief and immediately after counsel for plaintiff had announced that the Government rested, the defendants hereinafter specified moved the Court as follows, on which motion the Court made the following ruling and the follow-

ing proceedings were had, and to which ruling the said defendants excepted as follows:

“Mr. CANTWELL.—The Government rests.

Mr. FRAME.—If the Court please, if the jury might be excused for a few minutes, there are some matters we desire to bring to the attention of the Court in the absence of the jury.

The COURT.—You may be excused for a few minutes, gentlemen. Don't go very far away, so you will be within reach when the Marshal calls you.

(The jury retires at 1:55 P. M.)

Mr. FRAME.—If it please the Court, the defendants, Joe Pincolini, A. Pincolini and Dante Pincolini, each now moves the Court to instruct the jury that the evidence in this case is wholly insufficient to justify a conviction for the offense of conspiracy, upon the ground that the evidence neither proves nor tends to prove any unlawful [62] combination, either established expressly or inferably from any competent evidence of the facts and circumstances offered in this case. Upon the further ground, that any offense committed, if any has been shown to have been committed, does not in law constitute the offense of conspiracy; that no concerted action in respect to any transaction, or overt act, has been established by any legal or competent evidence in this case.

The defendant Susie Pincolini separately moves the Court to direct a verdict of not guilty in this case, upon the ground that there is no legal or com-

petent evidence proving or tending to prove her participation in any unlawful transaction which would constitute a conspiracy, or any overt act committed by her, or any act from which it could be inferred that this defendant has been guilty of a conspiracy, or knowingly and willingly engaged in any unlawful act which would amount to an overt act; or was a party to any combination, understanding or agreement, either express or implied, to violate the prohibitory law. And upon the further ground that there is no proof, or any legal or competent evidence to show this was a nuisance; that is, the keeping of liquors for sale, the sale of intoxicating liquor, or the knowing and wilful possession of intoxicating liquor by her, in violation of law; and that she is a married woman, and the wife of one of the defendants, and there would be a presumption that any act committed by her would be under coercion, and not her voluntary act.

The COURT.—The motion will be overruled. You may call the jury.

Mr. FRAME.—I presume the record may show that an exception is taken upon all the grounds stated?

The COURT.—Certainly.

The jury returned into court at 2.05 P. M. The recess just taken by the jury being the fifth recess by them taken since they were impanelled and sworn in this cause.”

BE IT FURTHER REMEMBERED, that, while JAMES BOYD, a witness who was called by and

(Testimony of James Boyd.)

testified in behalf of defendants, was being cross-examined, the following questions were asked him, to which defendants made the following objection, on which the Court ruled as follows, and to which ruling the defendants excepted as hereinafter specified:

Testimony of James Boyd, for Defendants (Cross-examination).

“Q. I presume you broke these bottles that day because you realized you were breaking the law, that you had intoxicating liquor in your possession?

A. I will tell you why I broke them; I broke them to protect the house as well as myself, for I had it there in the rooms; that is why I tried to destroy it.

Q. You realized somebody needed protection at that time, did you?

A. Well, I realized I needed it, in a way, you understand.

Q. You realized you were breaking the law, didn't you?

A. Not at that time I didn't know; I just didn't know only to destroy that stuff, that is all; that is all I thought about; not only to protect myself but to protect [63] the house, because I had it there unbeknownst to them people.

Q. Did you think at that time you had a perfect right to have that kind of liquor in your possession?

A. I didn't think much about it.

Q. You never had heard of the prohibition law, had you? A. Yes, sir.

(Testimony of James Boyd.)

Q. Never had heard that the prohibition law prohibits your having moonshine whisky in your possession? A. Oh, yes.

Q. You did know that your possession of that liquor was unlawful, didn't you?

A. Well, it must have been.

Q. And you know now when you are giving your testimony that you are making an admission that you yourself have broken the prohibition law, do you not? A. I suppose I have.

Q. Do you realize right now that if we had the Marshal put you under arrest on the charge of having possessed liquor on that day, there would be nothing for you to do but enter a plea of guilty? I am getting at his state of mind.

Mr. SALTER.—Objected to: he is not presumed to know the law in this case, or what would happen to him.

The COURT.—I will overrule the objection.

Mr. SALTER.—Exception.

The COURT.—Note the exception.

(By direction the reporter reads the question.)

The COURT.—Can you answer that question?

A. I say it is no time. I don't think, I haven't been—I am not being tried for any offense; I don't see why I have any right to answer that question.

(No other or further answer was given by the witness, requested by counsel, or directed by the Court to be made, and the examination of the witness proceeded along other lines.)

(Testimony of J. P. Donnelly.)

BE IT FURTHER REMEMBERED, that, while J. P. DONNELLY, a witness called in rebuttal by plaintiff, was testifying on direct examination, the following questions were asked him, the following objections thereto made by defendants, the following rulings and comment made by the Court, and the following exceptions taken and motion made by defendants:

Testimony of J. P. Donnelly, for Plaintiff (In Rebuttal).

“Q. Calling your attention to the 2d day of August, 1922, do you remember seeing Mr. Hogue in your office in the Clay Peters Building in Reno?

A. Yes, sir.

Q. At what time was he there?

Mr. FRAME.—If the Court please, we object at this time on the ground that this testimony apparently relates to a matter that if relevant, competent or material at all in this case, would be a part of the Government’s case in chief, and is not rebuttal; and for that reason we object.

The COURT.—I think I can see clearly where it will be rebuttal; if it is not in rebuttal we will see about it later.

Mr. CANTWELL.—(Q.) Do you remember what time, Captain Donnelley, that Mr. Hogue arrived at the office, or if you were there at the time of his arrival on August 2d?

A. He was there when I arrived shortly after one o’clock.

(Testimony of J. P. Donnelly.)

Q. Shortly after one o'clock in the afternoon?

A. Yes, sir. [64]

Q. Was his presence there at that time due to a request which had been made by you before that?

A. It was.

Q. Were you present from that time up to the hour of 3 o'clock, say, in the office? A. I was.

Q. Remained there all the time? A. I did.

Q. Were you present during the planning of the raid which was made that day on the Mizpah?

A. I was.

Q. Were you present at this search and marking of the money there? A. Yes, sir.

Q. Did you see that search made? A. I did.

Q. Did you see the delivery of the marked money?

A. I did.

Q. Were you there at the time Mr. Hogue and the prohibition officers left for the purpose of going to the Mizpah? A. Yes, sir.

Mr. FRAME.—I again renew the objection upon the ground that every word of this testimony, every question and every answer, is a matter that has already been presented in the case in chief, and it is properly a part of the case in chief, and is not rebuttal of anything; and we now move that the questions and answers already given be stricken out as not being rebuttal; and object to the questions propounded on the ground it is not rebuttal.

The COURT.—Objection overruled.

Mr. SALTER.—We ask an exception, if the Court please.

A. I was.

(Testimony of J. P. Donnelly.)

Mr. CANTWELL.—Q. About what time of the afternoon was that?

Same objection, ruling and exception.

WITNESS.—When they left the office?

Q. Yes. A. About 3 o'clock.

Q. Now between the time you arrived there shortly after one, and the time that Mr. Hogue left there with the prohibition officers about 3 o'clock, was Mr. Hogue there in the Federal Prohibition office with you all the time? A. He was.

Q. Did you see Hogue later that afternoon?

A. I did.

Q. Do you remember what time it was?

A. It was between half-past three and four o'clock, I should say about a quarter of four.

Q. At the prohibition office, was it?

A. At the prohibition office, my office.

Q. At that time did he return anything to you?

A. He did.

Q. What? A. Two dollars, two silver dollars.

Same objection, ruling and exception.

Q. Two silver dollars, you say? A. Yes, sir.

Q. Had you seen those silver dollars before?

A. I had.

Same objection, ruling and exception.

Q. Did you identify those two silver dollars as being among the coins that you had seen before?

A. Yes, sir.

Mr. FRAME.—Objected to as a conclusion, and incompetent, irrelevant and immaterial.

The COURT.—Well, if it is a conclusion he can

(Testimony of J. P. Donnelly.)

state how he knows they were the same silver dollars, if you wish it done that way.

Mr. FRAME.—I am objecting to all of this as not rebuttal.

The COURT.—Well, I have ruled it is admissible because I think it is rebuttal; and in any event it is within the [65] *the* discretion of the Court, if he feels it is proper, to reopen the case and allow further testimony to come in; but it seems to me this is very clearly rebuttal of some things that you have put in in defense. Proceed.

Mr. CANTWELL.—I asked you if you did identify those two silver dollars which were returned to you, as having been silver coins which you had seen before? A. I did.

Q. And just what coins were they?

A. They were two silver dollars that were marked that we had given Mr. Hogue to purchase the evidence.

The COURT.—That perhaps is your case in chief, but he certainly is at liberty to tell the markings that he saw on these dollars when they came back.

Mr. CANTWELL.—I presumed the question was properly rebuttal, for he testified that Mr. Hogue had brought back and delivered to him two of these particular silver coins which had been earlier in the afternoon given to him, and that he was able to identify them positively as being among those coins.

The COURT.—That is within the ruling; but what occurred there in the morning, or what occurred at 3 o'clock, or just before 3 o'clock, when

(Testimony of J. P. Donnelly.)

the witness went out, I don't care to have him go through the details; but he can tell how he identifies that money as money which he saw this man receive before.

Mr. CANTWELL.—Let me reframe my question in the form suggested by the Court.

Q. By what means did you identify these two silver coins which were returned to you by Mr. Hogue as being among those given to him theretofore that afternoon?

Mr. FRAME.—Objected to as not rebuttal of any testimony offered by the defendants.

The COURT.—I will say it seems to me this is very clearly rebuttal testimony of that which was given by Mr. McCaffrey; and the Government had no knowledge that Mr. McCaffrey was going to testify as to what occurred in the lobby. Mr. McCaffrey said that this man came into the lobby, and gave Dante Pincolini something, and he received a bill of exchange, and that this occurred at half-past one or two o'clock. I think this is properly in rebuttal of that testimony. If this testimony is true there is something wrong with the other testimony; and if the other testimony is true there is something wrong with Captain Donnelley's testimony. I can't see why it is not rebuttal testimony.

Mr. FRAME.—May the record show we have the benefit of the same objection and exception to this, and all similar testimony?

The COURT.—Certainly, you may have an exception; and if you have any further objection you

(Testimony of J. P. Donnelly.)

wish to urge to this, urge it now; and if you think of anything further before the case is finished, you can urge it then, and I will consider it.

Mr. SALTER.—Our position furthermore is, that other witnesses in the case in chief have testified as to the time that this occurrence took place in Captain Donnelley's office.

The COURT.—I don't know that there is a single witness who testified that this man Hogue was in that office [66] from one o'clock until three o'clock, and that he left at that time. If there is, I would like to have you call my attention to it.

Mr. SALTER.—My idea of it was that Mr. Nash testified that this money was given to him, and fixed the time up there at that time; and I believe also that Mr. Dubois testified to that.

The COURT.—According to their testimony, I think it was given to him about 3 o'clock.

Mr. SALTER.—I think Mr. Nash said about two-thirty.

The COURT.—Then there is all the more reason why this should go in. But at any rate, it is rebuttal of that testimony as to what occurred between the witnesses McCaffrey and Dante Pincolini between half-past one o'clock and two o'clock. You may go on.

Mr. CANTWELL.—(Q.) By what means did you identify those coins?

A. By a mark on the throat of the eagle.

Mr. CANTWELL.—You may take the witness.

Mr. FRAME.—There is no cross-examination.

(Testimony of Jonathan Payne.)

Now for the purpose of the record we move to strike all the testimony of Captain Donnelley as not rebuttal, and incompetent, irrelevant and immaterial to anything in the case.

The COURT.—It will be the same ruling and the same exception as you have had before.”

BE IT FURTHER REMEMBERED, that, while Jonathan Payne, P. Nash, A. Carter, P. E. DuBois and Thomas Scott, witnesses called in rebuttal by plaintiff, were testifying on direct examination, the following questions were asked each of them as hereinafter indicated, the following objections made by defendants thereto, the following rulings and comment made by the Court thereon, and the following exceptions taken by defendants:

Testimony of Jonathan Payne, for Plaintiff (In Rebuttal).

“Q. Do you recall at what time you returned to the office after lunch that day?

A. About one o'clock.

Q. Were you in the office all the time from one o'clock that afternoon, to say four o'clock that afternoon? A. I was there all afternoon.

Q. During any of this period of time did you see Mr. Hogue there, Mr. R. L. Hogue?

Mr. SALTER.—If the Court please, we desire to object to all of this line of testimony on the same ground as stated in the objection to Captain Donnelley's testimony. We anticipate this will be the same.

(Testimony of Jonathan Payne.)

The COURT.—It will be the same ruling and exception.

Mr. CANTWELL.—Might we save some time by now stipulating that all testimony of this character given in rebuttal may come in subject to that same objection, ruling and exception?

Mr. FRAME.—It will be satisfactory to us, so as to [67] save time.

The COURT.—Very well. If there is anything new, however, I expect you to raise an objection to that. This only covers such testimony as Captain Donnelley gave.

Mr. FRAME.—Yes.

Mr. CANTWELL.—(Q.) Did you see R. L. Hogue there in the office during any of this time?

A. I did.

Q. During what portion of that time was Mr. Hogue there in the office?

A. Mr. Hogue, I think met me in the hall as I came back from lunch about one o'clock, and he was there up to the time he went out to make this purchase at the Mizpah, and he came back again after that somewhere around four o'clock.

Q. What time would you say it was that he left for the purpose of making the purchase?

A. In the neighborhood of three, probably a few minutes after three.

Q. And you are positive that during all this time, from two o'clock until about three o'clock, when he left for that purpose, he was there in the office all the time?

(Testimony of Jonathan Payne.)

A. He was there all the time.

Q. When he returned to the office later that afternoon, did you see him surrender any thing to Captain Donnelley?

A. Mr. Hogue came back somewhere between, I think somewhere between 3:45 and 4:15, and gave Mr. Donnelley two silver dollars as the balance that was left from what had previously been given him."

Testimony of P. Nash, for Plaintiff (In Rebuttal).

"Mr. CANTWELL.—(Q.) You have heretofore testified, Mr. Nash, that on the afternoon of August 2d you were in the prohibition office, and that after giving Mr. Hogue some marked money you all left to go to the Mizpah at about three o'clock, I believe is your testimony? A. Yes, sir.

Q. For how long a period of time had you been in the prohibition office that afternoon?

Mr. SALTER.—We desire to urge the same objection.

Mr. CANTWELL.—Well, it was stipulated.

Mr. SALTER.—As to this witness, too?

Mr. CANTWELL.—As to all witnesses, this same line of testimony.

A. I got there shortly before two o'clock, and I was the last one in the office; the Captain phoned to me at my house.

Q. From the time you entered the office about

(Testimony of A. Carter.)

two o'clock until you all left with Hogue, was Hogue there in the prohibition office all the time?

A. He was."

Testimony of A. Carter, for Plaintiff (In Rebuttal).

"Mr. CANTWELL.—(Q.) Mr. Carter, calling your attention to the 2d day of August, I believe you have heretofore testified that about three o'clock that afternoon, after certain matters had transpired in the prohibition office, a bunch of you prohibition officers left the prohibition office with Mr. Hogue to go to the Mizpah Hotel, do you recall that testimony? A. I do. [68]

Q. Do you remember at what time you came to the prohibition office that afternoon? A. I do.

Q. At what time? A. About one o'clock.

Q. Did you remain in the prohibition office from the time that you arrived there about one o'clock until you prohibition officers left with Mr. Hogue at about three o'clock? A. I did.

Q. All the time? A. Yes, sir.

Q. What part of that time, if you know, was Hogue there in the office?

A. Hogue was there all the time.

Q. Was Hogue there when you arrived that afternoon? A. Yes, sir.

Q. Are you positive that he was not out of the prohibition office from the time that you arrived there until the whole bunch of you left about three o'clock? A. Yes, sir."

Testimony of P. E. DuBois, for Plaintiff (In Rebuttal).

“Mr. CANTWELL.—(Q.) Mr. DuBois, do you remember at what time of the day you arrived at the prohibition office in the Clay Peters Building that afternoon of August 2d, 1922?

A. One P. M.

Q. Did you remain there at the office thereafter and up to the time that you officers all left to go to the Mizpah, at about three o'clock? A. I did.

Q. Were you out of that office at all during that time? A. I was not.

Q. What part of that time, if you know, was Mr. Hogue there in the office? A. All that time.

Q. Are you positive that he did not leave the office from the time you arrived there about one o'clock until the whole bunch of you left about three o'clock to go to the Mizpah? A. Yes, sir.”

Testimony of Thomas Scott, for Plaintiff (In Rebuttal).

“Mr. CANTWELL.—(Q.) Mr. Scott, you testified that you were in the office of the Prohibition Director on the afternoon of August 2d; do you recall at what time you entered that office that afternoon?

A. Yes, sir, I came in at one-thirty P. M., went out and was gone about an hour, and came back again.

Q. You went out for about an hour after one-thirty? A. Yes, just stayed a moment.

(Testimony of Joe Pincolini.)

Q. And came back about two-thirty?

A. Yes, sir."

BE IT FURTHER REMEMBERED, that, while JOE PINCOLINI, a witness on behalf of defendants, who was, with the consent of the defendants, recalled by plaintiff for further cross-examination, was testifying on such further cross-examination, the following question was asked him, to which the following objection was made, on which the Court made the following ruling and comment, and to which ruling the following exception was taken:

**Testimony of Joe Pincolini, for Plaintiff (Recalled
—Cross-examination).**

"Mr. CANTWELL.—(Q.) Mr. Pincolini, you have testified to some things which happened on February 18th, 1922—at your place, the day when the officers, I believe, searched your place; do you recall that as being the date?

A. Yes, sir—well, I don't remember the date.

Q. Well, along about that time?

A. Along about that time, yes, sir.

Q. Now calling your attention to that particular day, whenever it was, that the officers were there and searched, do you recall having had a conversation with officers Brown and [69] Nash that day there in the vicinity of the Mizpah Hotel, in which you said to them, in substance at least, 'Well, you didn't find anything did you?' to which Mr. Nash replied in substance, 'No, but we found plenty of indications in the back room and cellars,

(Testimony of Joe Pincolini.)

I guess you will not deny that you had it there, you will surely get caught if you keep it up,' and to which you replied, 'Well, I don't consider that it is committing a crime to sell liquors, and will keep on selling as long as I am out of jail,' to which Mr. Nash replied to you, in effect, 'All right, if that is the way you feel about it'? A. No, sir.

Mr. FRAME.—Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination, and not material to any issue in this case; and for the further reason if the same was competent, relevant or material for any purpose, it would be in the state's case in chief; it is not in rebuttal.

Mr. CANTWELL.—We submit that it is in rebuttal of his declaration here on his examination in chief that he never at any time sold any intoxicating liquors in that place; and this is practically an admission on his part, if it be true, that he said this, that he would keep on selling as long as he was out of jail; and we submit it is competent and relevant, and is proper cross-examination for the purpose of laying the foundation for impeachment of this witness by contrary statements.

The COURT.—Well, it seems to me if he testified that he never sold any intoxicating liquor in that place, this is proper rebuttal of that testimony. You may ask the question.

Mr. FRAME.—To which we desire an exception on the grounds stated in the objection.

The COURT.—It is my understanding when one of the defendants goes in the witness-stand and testifies that he never sold liquor, the testimony of sales other than those set out in the indictment, and that occurred about that time, are admissible as contradicting his statement. If there is a question about that we can refer to the record.

Mr. FRAME.—I think we had better do that.

(The following testimony is read by the reporter:

‘Q. I will ask you whether at any time you had any agreement with either one of the other defendants, either collectively or individually, to keep or sell, or in any way dispose of or handle intoxicating liquors, at any time mentioned by the testimony in this case? A. No, sir.

Q. And did you either sell or assist any other person, either on the 6th of April or on the 10th of April, or on the 2d of August, or during the month of July, at any time sell or assist in selling, or consent that intoxicating liquor be either possessed, sold or kept on those premises for the purpose of sale? A. No, sir, I never did.’ Trans., p. 241.)

The COURT.—As I understand it, you only wished to have him deny that he had violated the law in April, July and August, and didn’t wish that question to be understood as going any further. I am going to let it go just that way. I think I am making a mistake, but a mistake I make in your favor does not do any particular harm; but it does strike me when you put in that term ‘at any time’ you meant to have him deny that he had ever vio-

lated the law at any time. However, I am willing to let it go just as you say it is, that you only wanted him to deny that he violated the law at the times specified in the indictment, and of course that shuts out the rebuttal testimony on that particular point.

Mr. CANTWELL.—That is all; the Government rests, your Honor.

Mr. FRAME.—That is all. That is our case.”
[70]

BE IT FURTHER REMEMBERED, that the Court, in charging the jury as to the common nuisance count in the indictment, discussed it in connection with the charge of conspiracy alleged therein, and, among other things, instructed the jury in the following language:

“In determining whether there was a conspiracy you are to consider all the conduct of the parties; you will consider the locked door, if you think any of the doors were locked; you will consider the conduct of Joe Pincolini with reference to this matter; you will consider the conduct of Dante and Adowaldo, and of the lady Mrs. Pincolini; and I think you would also consider the character of the establishment, the soft-drink place in front, the door and the kitchen in the rear. That is a large room, the only furniture apparently being a sink, with a drain-board and running water, a cupboard and two shelves. You should also consider the bottles; the bottle that was found in the sink and the contents of that bottle.

There is testimony that one of the milk bottles contained something smelling like alcohol. There were also a number of other bottles. One of the legs of the sink has been presented in evidence. I think it is something that should be considered by the jury in determining what that room was used for. You will notice neither end of the leg of the sink shows any nail marks; that leg has been there for a long time; it is hollow and can be taken out and put back again without destroying any nails, or any permanent fastening. The other leg is of the same character, and each leg is capable of being used to hide a bottle, perhaps several. You will also consider the sink and the running water, and the bottles there. Then I think it would be very proper for you to consider the testimony as to persons going from that back room to the door at the north, thence upstairs, if they went upstairs, and coming back with the glasses, and with liquor, if you believe that testimony.

There is no question about there being liquor in room 16. It is also a matter of significance that the liquor in that room was destroyed just at the time this raid was made, and that one of the defendants was there. If you consider the testimony of the witness Boyd, who admitted that a friend of his had taken liquor up to room 16, isn't it rather a significant circumstance that this man only went up there on the 29th day of July, it was the

first time that he had ever had that room, that he only stayed there until this raid was made, then disappears from the house, and is not there again as a tenant until this case comes on for trial; three days he has been there, and there is one day coming. These are all matters for you to consider in determining, not only whether there was a conspiracy on the part of these defendants; but also to determine whether that was a place kept for the purpose of selling intoxicating liquor. . . .

“Mr. Scott has testified as to two purchases made in April. Mr. Hogue has testified to a sale that was made on the 2d day of August. If their testimony is true, it shows that defendants were engaged in that place in selling liquor, at least on these dates. . . .

“There has been an abundance of evidence on the third count in the indictment, of making sales; and there has been a denial of those sales. As you have been informed repeatedly [71] it is your duty to accept the law as it is given you by the Court; you cannot question the law as it is given to you; you must follow the instructions of the Court. As to questions of fact, it is your duty to determine what the evidence proves, and you are to follow your own judgment, not the judgment of the Court, or the judgment of counsel, or what counsel may have said or what the Court may have said; you are bound to submit these matters of fact to your own conscience and to your

own judgment, under the instructions, and a true verdict render”;

to all of which the defendants objected in the following language:

“Mr. FRAME.—If it please the Court, we except to the portion of the Court’s charge wherein the Court summarizes and states the testimony, upon the ground that the same invades the province of the jury, and that the same is beyond the power of the Court in charging the jury as to mere matters of law”; that after said exception last quoted was by counsel for defendants stated and taken, the Court further charged the jury as follows:

“I have discussed this testimony, because it is within the province of the Judge to do so if he believes it to be his duty. It may not be so in the State courts, but it is the province and the right of a Federal Judge to discuss the testimony if he sees fit, and even to go so far as to give his opinion with reference to the case; provided he instructs the jury as I have done, that they must follow their own judgment, and that anything the Court says with reference to the facts and the evidence in the case, and the credibility of the witnesses, is a matter which can have no weight with them, except as it appeals to their judgment.”

No further exception was taken by defendants thereafter, nor was the exception taken before this renewed or restated, and the case was thereupon given to the jury.

BE IT FURTHER REMEMBERED, that thereafter the jury rendered a verdict of not guilty against the defendants A. Pincolini and Susie Pincolini, and a verdict of not guilty against said defendants D. Pincolini and J. Pincolini as charged in the first count of the indictment herein, and a verdict of guilty against said defendants D. Pincolini and J. Pincolini as charged in the second, third and fourth counts of said indictment; and that thereupon the said defendants D. Pincolini and J. Pincolini, by their counsel moved the Court for a new trial of said cause for the following reasons:

I.

“That the verdict so rendered herein against said D. Pincolini is contrary to the law of the case.

II.

That the verdict rendered herein against said J. Pincolini is contrary to the law of the case. [72]

III.

That the verdict so rendered against said D. Pincolini is not supported by the evidence in and to the degree required by law.

IV.

That the verdict so rendered against said J. Pincolini is not supported by the evidence in and to the degree required by law.

V.

That the evidence adduced and presented to the Court and jury at the trial of said cause is, and was, insufficient to justify said verdict against said D. Pincolini.

VI.

That the evidence adduced and presented to the Court and jury at the trial of said cause is, and was, insufficient to justify said verdict against said J. Pincolini.

VII.

Errors in law occurring at the trial and excepted to by the defendants, D. Pincolini and J. Pincolini, and each of them, which prejudiced each of said defendants herein named, and prevented them from having a fair and impartial trial, a memorandum of which will be served within the time required by law.

VIII.

That the fourth count set forth in the indictment herein fails to allege, and does not set forth, facts sufficient to constitute a public offense, and particularly the [73] offense charged therein.

IX.

Irregularities in the proceedings of said Court and jury, and each of them, by which said D. Pincolini and said J. Pincolini were, and each of them was, prevented from having a fair trial, as shown by the affidavit attached hereto.

X.

That the Court improperly instructed the jury to the prejudice of said defendants, D. Pincolini and J. Pincolini, and each of them, in this, to wit:

(a) That the Court instructed the jury in effect that there was sufficient evidence on the third count of the indictment, to wit, the charge that said defendants made sales of intoxicating liquor

in violation of law, as charged in the indictment, and thereby exceeded the province of the court and its jurisdiction and authority and invaded the province of the jury, in using the following language:

‘There has been an abundance of evidence on the third count in the indictment, of making sales.’

(b) In giving this instruction or using this language relating to testimony given by witnesses Scott and Hogue of sales made to them:

‘If their testimony is true, it shows that defendants were engaged in that place in selling liquor, at least on those days,’

in that it is too broad a statement of the law in its scope, and applies, as given, to all the defendants and is not limited, as to its effect and what it shows, to the defendants who these witnesses testified made these particular sales and those shown to have been acting in concert with them or in aid of them, and also in that it invades the province of the jury in stating the effect this testimony must be given.

(c) In giving this instruction relating to the proof of possession of intoxicating liquor and the necessity of proving actual possession and knowledge of possession by each of the defendants:

‘If each knew that the intoxicating liquor was there, and it was kept there with his knowledge, and they were engaged in the business, the possession of one would be the possession of the other,’

in that this instruction, as given, is not limited to a situation or condition where defendants had been proven to have been engaged in the business together and jointly, but the instruction should have contained the element of joint business or business in which the defendants concerned in the transaction were jointly engaged.

(d) In not including these words, 'as to what the law is,' or words of similar import, after the word, 'instructions,' in the following instruction:

'You are bound to submit these matters of fact to your own conscience and to your own judgment, under the instructions, and a true verdict render,'

in that and for the reason that the jury might have deemed that the instruction referred to in this language applied and referred to instructions or comments of the Court as to matters of fact and to references made by the Court to the testimony in commenting on it and on what it showed [74] and as to its abundance or sufficiency, as in this paragraph of this motion shown, such as the comment of the Court that if certain testimony be true 'it shows that defendants were engaged in that place in selling liquor,' and such as the comment of the Court when it stated, 'There has been an abundance of evidence on the third count in the indictment, of making sales.'

(e) In summing up the testimony and applying it to the various charges in the indictment, and in commenting on it and its effect, and more particu-

larly in this comment and question put to the jury for its consideration:

‘Isn’t it rather a significant circumstance that this man only went up there on the 29th of July, it was the first time he had ever had that room, that he only stayed there until the raid was made, then disappeared from the house and is not there again as a tenant until this case comes on for trial; three days he has been there, and there is one day coming.’

(f) In calling the attention of the jury to the interest of the defendants in the case and in suggesting as an inducement for them to testify as they did in the case an attempt to shield themselves from the consequences of a violation of the law in the use of the following language, in instructing the jury as to what elements they should take into consideration in weighing the testimony in this case:

‘Whether it is an attempt on his part to shield himself from the consequences of a violation of the law,’

without at the same time calling the attention of the jury to the interest that the prohibition officers might have had in the case, to wit, their anxiety to justify their conduct in making the raid and to procure a conviction upon the indictment which they had secured.

XI.

That the second count set forth in the indictment herein fails to allege, and does not set forth,

facts sufficient to constitute a public offense, and particularly the offense charged therein.”

And thereafter the said motion for a new trial was overruled by the Court, to which action of the Court the said defendants D. Pincolini and J. Pincolini duly excepted.

BE IT FURTHER REMEMBERED, that, after the jury had rendered a verdict of guilty as charged in the second, third and fourth counts of said indictment against the defendants D. Pincolini and J. Pincolini, the said defendants D. Pincolini and J. Pincolini thereupon and at the time of the filing and presentation of their said motion for a new trial, by their counsel, file a [75] motion in arrest of judgment herein as follows:

I.

“That the fourth count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense in violation of Section 21, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.

II.

That the second count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense, and particularly the offense charged therein, in violation of Section 3, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.

III.

That the third count set forth in said indictment

and verdict fails to allege and does not set forth facts sufficient to constitute a public offense, and particularly the offense charged therein, in violation of Section 3, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.

IV.

That the following irregularity, omission or defect appears from the record, or should appear from the record, of the proceedings had at the trial of said cause and during said trial, outside of the evidence:

That after the jury in said action had been duly impaneled and sworn to try said cause, to wit, during the afternoon of the second day of said trial and at the close of the testimony of witness Thomas Scott and at the time counsel for the Government announced that the Government rested, the Court excused the jury and allowed it to leave the courtroom without giving the jury the usual admonition for said jurors not to discuss the case among themselves or with any other person, and without admonishing it as to any other matters contained in the usual admonition to a jury when excusing it and allowing it to leave the courtroom or to separate.

V.

That the evidence adduced and presented to the Court and jury at the trial of said cause is and was insufficient to justify said verdict of guilty against said D. Pincolini as charged in either the second count of said indictment or in the third

count of said indictment or in the fourth count of said indictment.

VI.

That the evidence adduced and presented to the Court and jury at the trial of said cause is and was insufficient to justify said verdict of guilty against said J. Pincolini as charged in either the second count of said indictment or in the third count of said indictment or in the fourth count of said indictment.”

And thereafter the Court denied the said motion in arrest of judgment, to which ruling of the Court the said defendants D. Pincolini and J. Pincolini then and there duly excepted. [76]

That thereupon the Court rendered its judgment and sentence upon said verdict, which judgment and sentence is, in effect, as follows:

That said D. Pincolini is sentenced to a period of five months in the county jail of Washoe County, State of Nevada, and that he pay a fine in the sum of \$500.00; and that the said J. Pincolini is sentenced to a period of five months in the county jail of Washoe County, State of Nevada, and that he pay a fine in the sum of \$500.00; the said judgment to carry the costs;

and to which judgment and sentence defendants, and each of them, then and there duly excepted.

And forasmuch as the evidence and the proceedings and the matters of exception hereinbefore set forth do not fully appear of record, the said defendants D. Pincolini and J. Pincolini, by their

attorneys, tender this bill of exceptions, and pray that the same be settled, signed and sealed by the above-entitled court pursuant to the statute in such case made and provided.

Which is done accordingly this 20th day of March, 1923.

E. S. FARRINGTON,
Judge.

IT IS HEREBY STIPULATED AND AGREED, by and between the above-named plaintiff and defendants, through their respective counsel, that the foregoing may be settled as a bill of exceptions.

CHAS. A. CANTWELL,

Asst. United States Attorney.

McCARRAN & MASHBURN,

Attorneys for D. Pincolini and J. Pincolini. [77]

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Bill of Exceptions. Filed March 20, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [78]

In the District Court of the United States for the
District of Nevada.

No. 5663.

UNITED STATES OF AMERICA

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants, said Case being No. 5663 on the docket of said court.

I further certify that the attached transcript, consisting of 80 typewritten pages numbered from 1 to 80 inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the

originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$35.60, has been paid to me by Messrs. McCarran & Mashburn, attorneys for the defendants in the above-entitled cause. [79]

And I further certify that the original writ of error, and the original citation, issued in this cause, are hereto attached.

WITNESS my hand and the seal of said United States District Court this 24th day of March, A. D. 1923.

[Seal] E. O. PATTERSON,
Clerk U. S. District Court, District of Nevada.
[80]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,
Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States, to the Honorable the Judge of the District Court of the United States in and for the District of Nevada, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the United States, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants, a manifest error hath happened, to the great damage of the said defendants, D. Pincolini and J. Pincolini, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California within thirty days from date hereof, in the said [81] United States Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right,

and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 18th day of January, in the year of our Lord, one thousand nine hundred and twenty-three.

[Seal]

E. O. PATTERSON,
Clerk of the United States District Court, District
of Nevada.

Allowed by:

E. S. FARRINGTON,
Judge. [82]

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Writ of Error. Filed January 18th, 1923. E. O. Patterson, Clerk. [83]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI
and SUSIE PINCOLINI,

Defendants.

Citation to Writ of Error.

To the United States of America, Defendant in Error:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, in said Circuit, within thirty days from date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Nevada, wherein D. Pincolini and J. Pincolini are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable E. S. FARRINGTON, U. S. District Judge in and for the District of Nevada, this 18th day of January, A. D. 1923.

E. S. FARRINGTON,
Judge of the U. S. District Court in and for the District of Nevada.

[Seal] Attest: E. O. PATTERSON,

Clerk. [84]

I hereby this — day of January, A. D. 1923, accept due personal service of the foregoing citation on behalf of the United States of America, defendant in error.

Attorney for the United States. [85]

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Citation to Writ of Error. Filed January 18th, 1923. E. O. Patterson, Clerk.
[86]

[Endorsed]: No. 4000. United States Circuit Court of Appeals for the Ninth Circuit. D. Pincolini and J. Pincolini, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Received March 27, 1923.

F. D. MONCKTON,
Clerk.

Filed April 2, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

